Sabindo Nusantara Sdn Bhd & Anor v Majlis Perbandaran Tawau & Ors and another suit

HIGH COURT (KOTA KINABALU) — SUIT NO T(21) 12 OF 2006
ABDUL RAHMAN SEBLI J
3 SEPTEMBER 2010

Land Law — Indefeasibility of title and interests — Sabah Land Ordinance (Cap 68) — Disputed land alienated to first plaintiff for development on condition that car park and open space land be surrendered to government after completion of development — Government issued two title deeds in first plaintiff's name — Whether first plaintiff had indefeasible title to land — Whether government had made bona fide mistake in not cancelling the two title deeds — Whether first defendant contravened any law when it took possession of land — Limitation — Whether plaintiffs' claim statute barred — Whether first plaintiff could seek protection under s 6(2) of the Sabah Land Ordinance — Sabah Land Ordinance ss 6(2) & 26

By way of a letter dated 13 July 1971, the first plaintiff was granted a 99 year over a piece of state land situated in Tawau for commercial development. The letter of offer to alienate the land to the first plaintiff had clearly stated that the first plaintiff was to surrender sites for open spaces, car parks, road and market square located on the said land ('the car park and open space land') back to the government after completion of the development. When the first plaintiff surrendered the provisional lease to the government for sub-division, the latter issued two titled deeds in the name of the first plaintiff; the first title deed was for the purpose of a car park and the other title deed was for the purpose of a road reserve and open space ('the two title deeds'). However, the condition which required the first plaintiff to surrender the two title deeds to the government after development was deleted from both the title deeds. Upon completion of the development, the first defendant insisted that the first plaintiff surrender the title deeds back to it as agreed, but the first plaintiff refused to do so because it claimed to be the registered owner of the car park and open space land. However, the first defendant took possession of the car park and open space land. The first defendant then entered into two separate joint venture agreements with Aggasf Construction Sdn Bhd and Tawau Car Parks Sdn Bhd ('the parties to the JVA') to construct commercial shop lots on the car park and open space land. The first plaintiff was neither consulted nor had it consented to these joint venture agreements. In 2006 the first plaintiff commenced the present two suits against the first defendant and the parties to the JVA claiming a recovery of possession of the car park and open space land under the two title deeds. As the subject matter of both suits was similar the two

suits were consolidated and heard together. It was the plaintiffs' case that the first plaintiff as the registered owner of the car park and open space land had indefeasible title to the said land for 99 years and that the first defendant had acted ultra vires art 13 of the Federal Constitution when it took possession of the said land without paying the first plaintiff any compensation. The first defendant submitted that it had not contravened any law when it took possession of the car park and open space land because the first plaintiff did not enjoy indefeasibility of title over this land. The first defendant thus counterclaimed for an order that the first plaintiff either be ordered to complete the surrender of the two title deeds to the Land Survey Department or be ordered to complete the memorandum of transfer to the first defendant. The first defendant contended in the alternative that the plaintiffs' claim was statute barred as it was instituted twenty years after the first defendant took possession of the land. In reply, the plaintiff argued that by virtue of s 6(2) of the Sabah Land Ordinance ('the Land Ordinance') the adverse possession of the land by the first defendant did not extinguish the first plaintiff's legal title to the land.

Held, dismissing the plaintiffs' claims against the defendants in both suits with costs and allowing the first defendant's counterclaim:

(1) There was no provision in the Land Ordinance conferring indefeasibility of title or interests in land. In the present case, although there was no admission by the government that it had made a mistake in not cancelling the two title deeds, there was no doubt that the omission was a genuine mistake. The first plaintiff could not be allowed to profit from the government's mistake by claiming ownership of the two titles and consequently to possession of the land forming part of the two title deeds. Further, all the actions of the first plaintiff were a manifestation of its knowledge that the government had made a mistake and that it had no right to retain the two title deeds. Thus the first plaintiff in the instant case was a bare trustee for the first defendant, who represented the government, and the two title deeds passed back to the government once development was completed because on the happening of that event the first plaintiff was to be regarded as having divested itself of its interest in the land (see paras 18, 21 & 22).

(2) The plaintiffs' claim was statute barred because it was filed more than 12 years after the date of dispossession. Since s 6(2) of the Land Ordinance only came into force on 31 December 1997 and the first defendant had been in possession of the car park and open space land since 1982 or 1983, without any protest by the plaintiffs, adverse possession had already set in to bar the plaintiffs' claim. In any case, even if s 6(2) of the Land Ordinance applied, on the basis that it operated retrospectively, the first plaintiff could not avail itself of the protection accorded by that provision because it was only a bare trustee and not the owner or the person entitled to the land (see paras 24, 25 & 28).

[Bahasa Malaysia summary

Melalui surat bertarikh 13 Julai 1971, plaintif pertama telah diberikan tempoh 99 tahun untuk sebidang tanah yang terletak di Tawau untuk pembangunan komersial. Surat tawaran untuk tidak memberi milik tanah itu kepada plaintif pertama dengan jelasnya menyatakan bahawa plaintif pertama hendaklah menyerahkan semula tapak untuk kawasan lapang, tempat letak kereta, jalan dan pasar terletak di atas tanah tersebut ('tanah tempat letak kereta dan kawasan lapang') kepada kerajaan selepas tamatnya pembangunan. Apabila plaintif pertama menyerahkan pajakan sementara kepada kerajaan untuk pecah bahagian, kerajaan mengeluarkan dua suratikatan hakmilik di atas nama plaintif pertama; suratikatan hakmilik pertama adalah bagi tujuan tempat letak kereta dan surat ikatan hakmilik yang satu lagi adalah bagi tujuan jalan rizab dan kawasan lapang ('dua suratikatan hakmilik'). Walau bagaimanapun, syarat yang memerlukan plaintif pertama untuk menyerahkan dua suratikatan hakmilik kepada kerajaan selepas pembangunan dibuang daripada kedua-dua suratikatan hakmilik. Apabila pembangunan tamat, defendan menggesa plaintif pertama menyerahkan suratikatan hakmilik semua seperti yang dipersetujui, tetapi plaintif pertama enggan berbuat demikian kerana dia menghujahkan bahawa dia adalah pemilik berdaftar tanah tempat letak kereta dan kawasan lapang. Walau bagaimanapun, defendan pertama mengambil milikan tanah tempat letak kereta dan kawasan terbuka. Defendan pertama kemudiannya mengikat suatu perjanjian-perjanjian usaha sama dengan Aggasf Construction Sdn Bhd dan Tawau Car Parks Sdn Bhd ('pihak-pihak kepada PUS') untuk membina lot-lot kedai komersial di atas tanah tempat letak kereta dan kawasan lapang. Plaintif pertama tidak dirujuk mahupun bersetuju ke atas perjanjian-perjanjian usaha sama. Pada 2006, plaintif pertama memulakan dua tindakan ini terhadap defendan pertama dan pihak-pihak kepada JVA bagi menuntut milikan semula tanah tempat letak kereta dan kawasan lapang di bawah suratikatan hakmilik. Memandangkan kedua-dua tindakan adalah sama, kedua-dua tindakan disatukan dan didengar bersama. Adalah menjadi kes plaintif-plaintif bahawa plaintif pertama sebagai pemilik berdaftar tanah tempat letak kereta dan kawasan terbuka mempunyai hakmilik tak boleh sangkal ke atas tanah tersebut selama tempoh 99 tahun dan bahawa defendan pertama telah melakukan ultra vires perkara 13 Perlembagaan Persekutuan apabila ia mengambil milikan ke atas tanah tersebut tanpa membayar sebarang pampasan kepada plaintif pertama. Defendan pertama menghujahkan bahawa dia tidak menyangkal mana-mana undang-undang apabila ia mengambil milikan ke atas tanah tempat letak kereta dan kawasan lapang kerana plaintif pertama tiada hak milik tak boleh sangkal ke atas tanah tersebut. Defendan pertama kemudiannya menuntut balas untuk suatu perintah bahawa plaintif pertama sama ada diperintahkan untuk menyerahkan kedua-dua surat hakmilik kepada Jabatan Tanah dan Ukur atau diperintahkan untuk menyempurnakan memorandum pindahmilik kepada defendan pertama. Defendan pertama menghujahkan secara alternatifnya bahawa tuntutan

plaintif dihalang oleh statut memandangkan ia dibuat 20 tahun selepas defendan pertama mengambil milikan ke atas tanah. Plaintif membalas bahawa menurut s 6(2) Ordinan Tanah Sabah ('Ordinan Tanah') milikan bertentangan ke atas tanah oleh defendan pertama tidak melenyapkan hakmilik sah plaintif ke atas tanah.

Diputuskan, menolak tuntutan plaintif terhadap defendan dalam kedua-dua tindakan dengan kos dan membenarkan tuntutan balas defendan:

(1) Tiada peruntukan di dalam Ordinan Tanah yang membincangkan hakmilik tidak boleh disangkal atau kepentingan ke atas tanah. Di dalam kes ini, walaupun tiada pengakuan oleh kerajaan bahawa ia telah terkhilaf dalam membatalkan dua suratikatan hakmilik, tiada keraguan bahawa ketinggalan tersebut adalah satu khilaf yang nyata. Plaintif pertama tidak boleh dibenarkan mendapat keuntungan daripada khilaf kerajaan dengan mendakwa pemilikan ke atas dua milikan dan seterusnya kepada pemilikan ke atas tanah membentuk bahagian dua suratikatan hakmilik. Tambahan lagi, semua tindakan plaintif pertama adalah manifestasi pengetahuannya bahawa kerajaan telah terkhilaf dan ia tiada hak untuk menahan dua suratikatan hakmilik. Dengan itu, plaintif pertama di dalam kes ini adalah pemegang amanah sahaja kepada defendan pertama, yang mewakili kerajaan dan kedua-kedua suratikatan hakmilik yang dipulangkan kepada kerajaan selepas tamat pembangunan adalah kerana berlakunya keadaan di mana plaintif pertama dianggap sebagai telah melepaskannya daripada kepentingan ke atas tanah (lihat perenggan 18, 21 & 22).

(2) Tuntutan plaintif terhalang oleh statut kerana dia telah memfailkan tuntutan lebih daripada 12 tahun selepas tarikh perampasan. Memandangkan s 6(2) Ordinan Tanah hanya mula efektif pada 31 Disember 1997 dan defendan pertama mempunyai milikan ke atas tempat letak kereta dan kawasan lapang tanah sejak tahun 1982 atau 1983, tanpa sebarang protes oleh plaintif-plaintif, milikan bertentangan telah berlaku untuk menghalang tuntutan plaintif. Dalam apa jua keadaan, walaupun s 6(2) Ordinan Tanah terpakai, atas alasan bahawa ia beroperasi secara retrospektif, plaintif pertama tidak melayakkan dirinya untuk perlindungan yang dinyatakan di bawah peruntukan tersebut kerana dia adalah pemegang amanah sahaja dan bukan pemilik atau pihak yang berhak ke atas tanah tersebut (lihat perenggan 24, 25 & 28).]

Notes

For a case Sabah Land Ordinance (Cap 68), see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3467.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (refd)

Datuk Harris bin Mohd Salleh v Seck Mun Foo [1999] 2 MLJ 442, CA (refd)
Fraser v Walker [1967] 1 All ER 649, PC (refd)
Lee Chi Min & Anor v Superintendant of Land and Survey Department, Kuching [1981] 1 MLJ 93, FC (refd)
Ramdal v Chetu 1958 AIR Punjab 335 (refd)
Seck Mun Foo v Datuk Harris Mohd Salleh [1997] 1 CLJ 321, HC (refd)

Legislation referred to

Federal Constitution art 13
Land (Control of Subdivision) Ordinance (Sarawak Cap 82) s 10
Limitation Ordinance (Sabah Cap 72) s 26
Sabah Land Ordinance (Cap 68) s 6(2)

Yunof Maringking (Maringking & Co) for the plaintiff.
Zaleha Rose Pandin (Senior State Counsel of the State Attorney General's Chambers) for the first defendant.
Brandon Keith Soh (Ronny Cham & Co) for the second, third and fourth defendants.
Liew Hon Min (Hon Min & Co) for the second defendant.

Abdul Rahman Sebli J:

THE AGREED FACTS

[1] In 1971 the first plaintiff applied for state land ('the said land') in Tawau for commercial development and was approved for 21 acres only by the Chief Minister's office. The period granted was 99 years subject to the terms and conditions stipulated in the letter of offer dated 13 July 1971.

[2] By letter dated 8 August 1973, the Director of the Land and Survey Department confirmed alienation of the said land for 99 years but the sites for open spaces, car parks, road and market square ('the car park and open space') thereon shall be leased for five years only commencing on 1 January 1972.

[3] A provisional lease No 106290831 was then issued by the state government ('the government') for an area measuring 31.50 acres and valid only from 1 January 1972 to 31 December 1978. The terms expressly required the first plaintiff to surrender back to the government the car park and open space after development of the said land.

[4] When the first plaintiff surrendered the provisional lease for subdivision, the government issued to the first plaintiff TL No 107522985 measuring 18.11 acres for the purpose of a car park and TL No 107523008 measuring 3.12 acres for the purpose of a road reserve and open space ('the two title deeds'), both for

a term of 99 years. The term which required the first plaintiff to surrender back the two title deeds to the government after development was deleted.

[5] The two title deeds were then charged to the then bank Bumiputra Berhad Tawau Branch as security for a loan of RM10m which the first plaintiff borrowed to finance the development of the said land. The two title deeds were only redeemed by the first plaintiff in 1988.

[6] When later the first defendant insisted that the first plaintiff surrender back the two title deeds to them the first plaintiff refused to do so and it remains the registered owner of the two title deeds. However the first defendant had since taken possession of the car park and open space.

[7] On 28 January 1993 the first defendant in Suit No T(21) 13 of 2006 and the third defendant entered into a joint venture agreement and a supplementary agreement dated 16 August 1997 to develop commercial shop lots on the car park and open space.

[8] Subsequently the first and second defendants in suit No T(21) 13 of 2006 entered into privatisation agreements on 28 August 1993 and on 5 May 1998 to run the car park business.

[9] On 13 December 1996 the first and second defendants and on 16 December 1996 the first and third defendants in suit No T(21) 12 of 2006 respectively entered into a joint venture agreement and also created a power of attorney to construct commercial shop lots on the car park and open space.

[10] The first plaintiff as the registered owner of the said land was never consulted nor did it consent to the joint venture agreements between the defendants to run the car park business and to construct commercial shop lots on the said land.

[11] The road and car parking lots in TL No 107522985 have been used by the general public since the completion of the Bandar Sabindo project in 1979 and the first defendant has been maintaining and upkeeping them up to this day.

THE CLAIMS

[12] The first plaintiff is claiming to recover possession of the land which forms part of the two title deeds. The first defendant is counterclaiming for an order that the first plaintiff be ordered to complete the surrender of the two title deeds to the Land and Survey Department or in the alternative that the first

plaintiff be ordered to complete the memorandum of transfer to the first defendant. The third defendant in Suit No T(21) 13 of 2006 had been struck off as a party and thus did not appear during the trial.

THE ISSUE

[13] The plaintiffs' case is that the first plaintiff as registered owner of the said land has indefeasible title thereon for 99 years and that the first defendant acted ultra vires art 13 of the Federal Constitution when it took possession of the said land without paying any compensation. The decision of the Privy Council in *Fraser v Walker* [1967] 1 All ER 649 was cited in support of the plaintiffs' contention that the first plaintiff enjoys indefeasibility property rights on the said land or legal estate therein which he is immune from attack or adverse claim during the 99 years tenure of the title deeds.

[14] In my view the crucial question in relation to this issue, and this applies to all parties in both suits is whether the government had made a bona fide mistake in not cancelling the two title deeds and if so whether the first plaintiff is a bare trustee holding the same for the benefit of the first defendant. If the answer is in the affirmative then the first plaintiff does not enjoy indefeasibility of title over the said land although registered in its name and that consequently the first defendant did not contravene any law when it took possession of the same.

THE APPLICABLE LAW

[15] Unlike the position in Peninsular Malaysia and Sarawak, there is no provision in the Sabah Land Ordinance ('the Land Ordinance') conferring indefeasibility of title or interests in land which is a feature of central importance to the Torrens system of land registration. The concept of land tenure in Sabah is a modified Torrens system of land registration which recognizes the concept of bare trust in a vendor/purchase situation: see *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561 (FC) per Edgar Joseph Jr FCJ at pp 576 and 580.

[16] The decision of the High Court in *Seck Mun Foo v Datuk Harris Mohd Salleh* [1997] 1 CLJ 321 and affirmed by the Court of Appeal in *Datuk Harris bin Mohd Salleh v Seck Mun Foo* [1999] 2 MLJ 442 is another example of the acceptance of the concept of bare trustee in Sabah. In that case Suleiman Hashim J said at p 332:

> With respect, a person who has parted with his land and has received the purchase money as the defendant in the present case is bare trustee of the land. His name may appear on the land title but he may assert no legal rights over it because the equitable and beneficial ownership has passed to the buyer. Since the plaintiffs have proved

that the defendant has sold the land to Berdikari the defendant s only a bare trustee of the land even though his name still appears on the land title. I have for my guidance the case of *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 where it was held that the registered proprietor having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent who was the equitable owner, also *Temenggong Securities Ltd & Anor v Registrar of Titles Johore & Ors* [1974] 2 MLJ 45.

[17] The facts in *Lee Chi Min & Anor v Superintendant of Land and Survey Department, Kuching* [1981] 1 MLJ 93 (FC) bear a striking similarity to the facts in the present case. In that case the appellants owned a piece of land in Kuching North Land District. They applied for sub-division and was approved subject to certain conditions. Among the conditions was that the two subdivided lots were to be surrendered to the state government free of charge for use as open space. Subdivided titles were prepared including the two open space lots. However instead of keeping the two open space titles the state government released them to the appellants. The state government also forgot to endorse on the two titles that they were to be used as an open space. For the next ten years the state government demanded quit rent for the two titles and the appellants dutifully paid the quit rent. In order to rectify the error the Superintendant of Land and Survey attempted to rectify the register by using s 10 of the Land (Control of Subdivision) Ordinance (Sarawak Cap 82). The attempt was challenged by the appellant and the High Court decided in favour of the respondent. The appellants appealed to the Federal Court but the appeal was dismissed. Suffian LP said at p 95:

Here permission to subdivide was given on condition that the two lots should be surrendered to government without any charge for use as open space. The condition was agreed to by the appellant. Government need not have issued title in regard to these two lots, or having issued them it should have registered them in their own name as owners. Instead they issued them, and in the name of the appellants without mention of the special conditions and then handed them over to the appellants. The appellants must have rubbed their eyes in disbelief when the documents of title landed on their laps. The appellants knew all this was a mistake, and yet kept quiet. I do not think that they should be allowed to profit from government's mistake.

[18] Similarly in the present case although there is no admission by the government that it made a mistake in not cancelling the two title deeds there can be no doubt that the omission was a genuine mistake. The letter of offer to alienate dated 22 April 1974 clearly states that the first plaintiff was to 'surrender back to Government after development all the areas marked Road reserve, open space, car park and the market square' (pp 23–26 of encl 109). The plaintiff cannot be allowed to profit from the government's mistake by claiming ownership of the two titles and consequently to possession of the land forming part of the two title deeds.

[19] The first plaintiff itself acknowledged the need to surrender the two title deeds to the government. This is evidenced by the fact that on 18 August 1983 the first plaintiff through its solicitors forwarded the original titles, partial satisfaction and release, the surrender of title and the certificate of payment form in respect of the two title deeds by registered post to the first defendant for the purpose of surrendering the road reserve, car park and open space to the first defendant.

[20] Then on 10 January 1985 the first plaintiff had, through its Executive Director Datuk Tsen Chi Henn, swore a statutory declaration explaining clearly how the titles had been delivered to its solicitors for the purpose of surrender to the Tawau Municipal Council and that the titles were lost. These are contained in paras (3) and (5) of the statutory declaration (p 68–69 of encl 112) as follows:

> (3) On or about the 18th day of August 1983, my Solicitors sent the said titles together with other related documents by registered mail under registration No. 2998 to the Tawau Municipal Council for surrender to them:
>
> (5) I now verily believe that the said titles have been lost and would make an application to the Authority for the issue of certified true copies for replacement and should I subsequently recover the lost copies of the said titles I undertake to surrender them to the proper Authority for disposal.

[21] Finally, on 6 July 1988 the first plaintiff forwarded the certified true copies of title (as replacements for the original titles) and the surrender of title documents to the first defendant for the purpose of surrendering them to the first defendant.

[22] All these actions on the part of the first plaintiff is a manifestation of it's knowledge that the government had made a mistake and that it had no right to retain the two title deeds. Since it was a condition of the offer to alienate that the first plaintiff was to surrender the car park and open space to the government after completion of the development the first plaintiff was legally bound to do so once the land had been developed. The first plaintiff cannot have the cake and eat it. The first plaintiff being in equity a bare trustee for the first defendant representing the government, the two title deeds passed back to the government once development was completed because on the happening of that event the first plaintiff must be regarded as having divested itself of its interest in the land.

[23] I am therefore unable to accept Mr Yunof Maringking's argument that since the government had not cancelled the two title deeds the first plaintiff as the registered owner has indefeasible title thereon during the 99 years tenure of the title deeds.

LIMITATION PERIOD AND ADVERSE POSSESSION

[24] It is the first defendant's contention in the alternative that the plaintiffs' claim is statute barred by virtue of item 110 and or item 112 of the schedule of the Limitation Ordinance (Sabah Cap 72) ie that the action was filed more than 12 years after the date of dispossession. Section 26 of the Limitation Ordinance provides as follows:

> At the determination of the period limited by this Ordinance to any person for instituting a suit to recover possession of immovable property the right and title of such person to the immovable property, for the recovery whereof such suit might have been instituted within such period, shall be extinguished.

[25] I agree with the first defendant because the present action was only instituted in 2006, 20 years after the first defendant took possession of the land after completion of the development in the 1980's. Counsel for the plaintiffs argued that by virtue of s 6(2) of the Land Ordinance the adverse possession of the land by the first defendant did not extinguish the first plaintiff's legal right or title to the said land. Section 6(2) of the Land Ordinance provides:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the owner or any person entitled to an interest therein, and accordingly, any written law relating to the limitation of suits in force in Sabah shall in no circumstances operate to extinguish any title or interest in land.

[26] However it has been brought to my attention that the above provision only came into force on 31 December 1997 vide gazette notification No 4 of 1997 whereas the first defendant had been in possession of the car park and open space since at least 1982 or 1983 without any protest by the plaintiffs. Clearly therefore adverse possession had already set in to bar the plaintiffs' claim latest by 1994 or 1995, long before s 6(2) of the Land Ordinance came into force.

The doctrine of adverse possession was explained by AN Bhandari CJ in *Ramdal v Chetu* 1958 AIR Punjab 335 as follows:

> Adverse possession, as its words imply, must be actual possession of another's land with intention to hold it and claim it as his own. It must commence with the wrongful dispossession of the rightful owner at some particular time; it must commence in wrong and maintained against right. It must be actual, open, notorious, hostile, under claim or right, continuous, and exclusive and maintained for the statutory period. Indeed it should be open and exclusive as to leave no doubt as to the intention of the occupant, so notorious that the owner may be presumed to have knowledge of the adverse claim and so continuous as to furnish a cause of action every day during the required period.

In my view even if s 6(2) of the Land Ordinance applies on the basis that it operates retrospectively still the first plaintiff cannot avail itself of the protection accorded by that provision because the provision accords protection only to 'the owner or any person entitled to an interest therein'. The first plaintiff being a bare trustee cannot claim to be the owner or the person entitled to the said land.

CONCLUSION

[27] For all the above reasons the plaintiff's claims against the first defendant in both suits were dismissed with costs, to be taxed unless otherwise agreed. Since the liabilities of the other defendants are dependent on the liability of the first defendant likewise I dismiss the claim against each of them in both suits.

[28] As for the counterclaim I am satisfied that the first defendant is entitled to the orders sought. In the circumstances the counterclaim was allowed in terms.

Plaintiffs' claims against defendants in both suits dismissed with costs and first defendant's counterclaim allowed.

Reported by Kohila Nesan